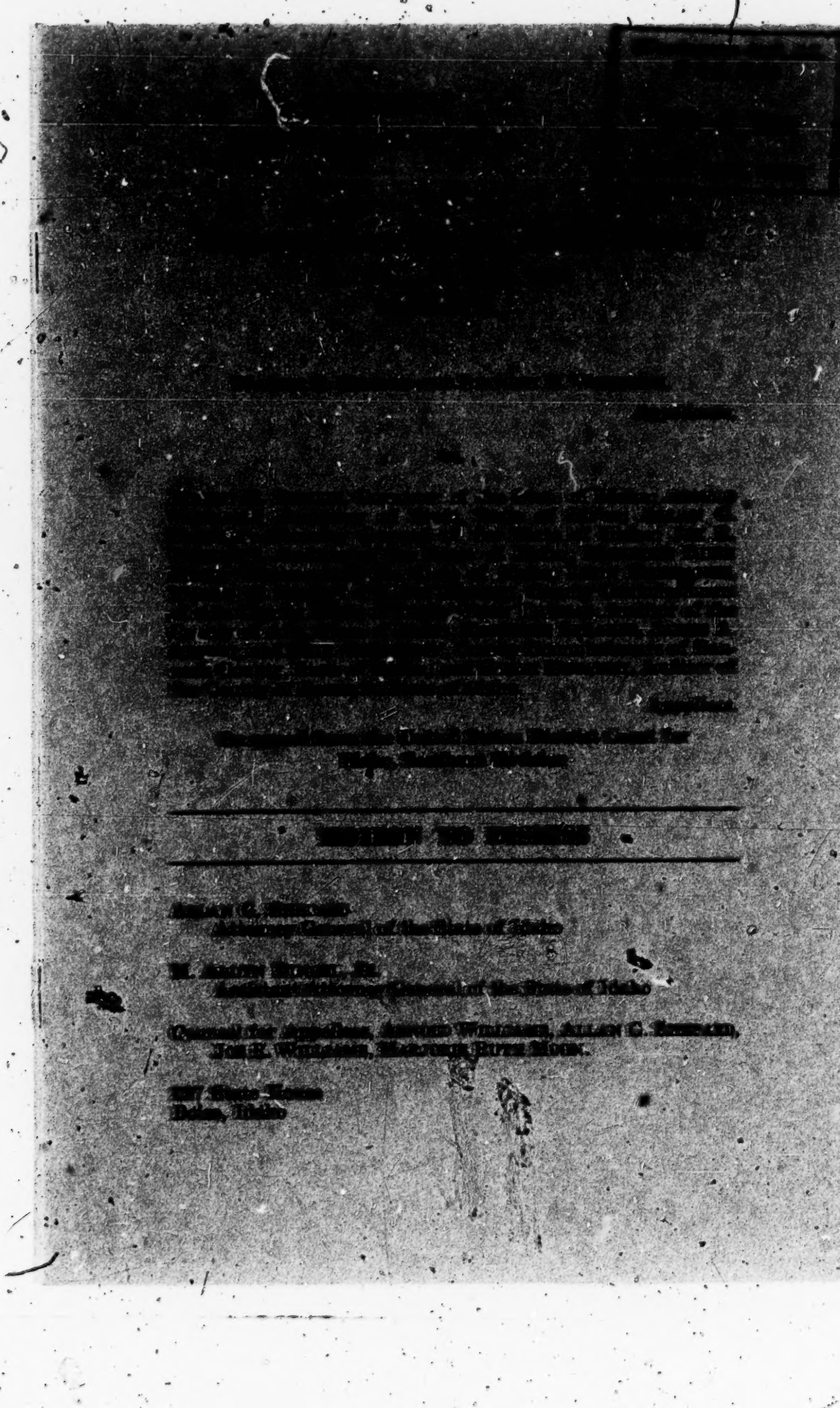

IN THE

Supreme Court of the United States

_____ Term, 1965

No_____

WALTER R. HEARNE AND STANLEY E. WHITMAN,

Appellants,

vs.

ROBERT E. SMYLIE, Governor of the State of Idaho; ARNORD WILLIAMS, Secretary of State, State of Idaho; ALLAN G. SHEPARD, Attorney General of the State of Idaho; JOE R. WILLIAMS, Auditor of the State of Idaho; MARJORIE RUTH MOON, Treasurer of the State of Idaho; LEON FAIRBANKS, MARVIN E. WRIGHT and ROY MURPHY, County Commissioners of Ada County, State of Idaho; VERN THOMAS, Auditor of the County of Ada, State of Idaho; EMMETTE SPRAKER, JAMES A. ABBOTT, and PAUL GREGERSEN, County Commissioners of Bannock County, State of Idaho; and SARAH DEVANEY, Auditor of the County of Bannock, State of Idaho.

Appellees.

On appeal from the United States District Court for Idaho, Southern Division

MOTION TO DISMISS

Appellees, Arnold Williams, Allan G. Shepard, Joe R. Williams and Marjorie R. Moon, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the appeal herein be dismissed on the ground that the instant appeal has become moot.

ARGUMENT

Appellees, Arnold Williams, Allan G. Shepard, Joe R. Williams, and Marjorie Ruth Moon believe the in-

stant appeal pursued by appellants is now academic by reason of changing circumstances. Appellants' appeal is now meaningless and hollow because the subject matter of their appeal has become moot as explained below.

The three-judge statutory court in the instant matter of legislative reapportionment of the Legislature of the State of Idaho, handed down on July 28, 1964, the following Stay Order:

"The Mandate of the United States Supreme Court having been received on July 20, 1964; and it appearing to the Court:

"(1) That Idaho's primary election is to be held on August 4, 1964, and therefore 'an impending election is imminent and . . . [the] State's election machinery is already in progress' [*Reynolds etc. et al v. Sims et al,* U. S. 32 Law Week 4535, 4550 (6/15/'64)];

"(2) That it would not be possible at this time to take further proceedings in conformity with the opinion of the Supreme Court, which would not be reasonably certain to disrupt seriously the election machinery established for the August 4th primary election and the forthcoming general election in November, and thus disenfranchise, or dilute the franchise, of far more persons than would reasonably be expected to result from continuing the existing legislative apportionment system until after the next session of the Idaho Legislature in January of 1965; Accordingly

"IT IS ORDERED That decision on all pending motions is reserved, and all further proceedings in this action are hereby stayed, until the expiration of the period of thirty (30) days next following adjournment of the next regular session of the Legislature of the State of Idaho in January of 1965, or until further order of Court." (Emphasis added.)

The appellants on August 26, 1964, filed their Notice of Appeal contending that the above Stay Order was improper. Appellants filed their Jurisdictional Statement and these appellees filed in response thereto, their Motion to Dismiss or Affirm.

This Court on February 1, 1965, in Opinion No. 617, 185 S. Ct. 713, speaking in regard to the instant appeal said in a Per Curiam decision:

> "This cause is continued on the docket until the Court Conference of May 21, 1965, before which time the parties are asked to advise the Court by supplemental briefs as to the progress made in reapportioning the Idaho Legislature."

The Thirty-Eighth Session of the Idaho Legislature adjourned March 18, 1965. By Proclamation of the Governor, read to the members of the Legislature immediately prior to the adjournment of the regular session, the Legislature was called into an extraordinary session at nine o'clock a.m. the following day, March 19, 1965. Pursuant to this call, both branches of the Legislature convened at said time and date. The Governor's call requested the Legislature:

"To consider the passage of, and to enact, legislation reapportioning the membership of the Idaho State Senate and the membership of the Idaho State House of Representatives among the several counties in conformance with the Constitution of the United States."

It would be unwarranted criticism for one to suggest that the Legislature was ill prepared for this task and had not anticipated the monumental work in that venture. As an example, the First Extraordinary Session of the Thirty-Seventh Session of the Idaho State Legislature met in August of last year and enacted House Bill No. 4:.

"SECTION 1. There is hereby appropriated from the General Fund of the State of Idaho to the Legislative Council, the sum of $20,000.00, or so much thereof as may be necessary, for the purpose of conducting a study of the problem of reapportioning the Idaho Legislature. *The Council shall complete the study and make report thereon to the membership of the Legislature at the earliest possible date.*" (Emphasis added.)

The Legislative Council hired additional employees and immediately engaged itself in complying with the Legislature's directive. After extensive work the Legislative Council on November 28, 1964, submitted to the members of the Thirty-Eighth Session of the Idaho Legislature of the State of Idaho its written and compiled report relating to reapportionment. Included in

the report were 70 plans pertaining to reapportionment of the House of Representatives and Senate of the Idaho Legislature.

The First Extraordinary Session of the Thirty-Eighth Session of the Idaho Legislature adjourned last Thursday, March 25, 1965, only six days after convening.

The proposals concerning reapportionment were not discussed in the six days with tirades approaching attitudes of indecision, passion and irascibility, but instead the special session was marked with debate of an orderly and mature fashion. The Legislature recognized the problem of reapportionment and examined possible solutions at considerable length.

The said special session enacted House Bill No. 3, which reapportioned the House of Representatives and Senate Bill No. 11 which reapportioned the Senate. The enacted apportionment plans obviously demanded amendments to the election law machinery to assure that the complex election mechanism could operate in line with reapportionment. Readily recognizing this problem, the Legislature enacted Senate Bill No. 10 which amended the election code of the State of Idaho.

Even if the Idaho Legislature had not acted with dispatch as it so did, the instant appeal would in all practicality, be moot because the thirty-day period specifically stated in the Stay Order of the three-judge statutory court would have expired April 17, 1965,

only eighteen days from the date of these appellees' present motion to dismiss.

These appellees wish to emphasize that the *only topic* raised by appellants in their instant appeal is directed solely at the Stay Order of the three-judge statutory court. Thus, this Court does not have before it the question of the validity of the present legislative apportionment of the State of Idaho; nor does this Court have before it the question of the validity of the new apportionment statutes. By the very wording of the Stay Order, those questions lie with the three-judge panel, and that judicial body will consider such in the very near future. The single issue now before this Court is whether or not the Stay Order was proper. These appellees submit that this issue is now of no import and is, therefore, moot.

CONCLUSION

It would be folly to suggest that the Stay Order issued by the three-judge statutory court was not for the explicit purpose of granting the Idaho Legislature the opportunity of remedying the alleged discrepancies in Idaho's legislative apportionment. The Stay Order seemed only apropos in light of this Court's language in *Reynolds v. Sims*, 377 U. S. 533, , 84 S. Ct. 1362, 1394, 12 L. Ed.2d 506, 541:

> ". . . it is correctly recognized that legislative reapportionment is primarily a matter for legislative consideration and determination and that judicial

relief becomes appropriate only when a legislature fails to apportion according to Federal constitutional requisites in a timely fashion, after having had an *adequate* opportunity to do so." (Emphasis added.)

These appellees believe that the three-judge statutory court will have before it for consideration on the merits at an early date, the new reapportionment statutes, House Bill No. 3 and Senate Bill No. 11.

Thus, for the reasons stated above, the instant appeal has become moot. These appellees request and desire this court to dismiss the appeal in order that the present litigation may be heard in the proper forum: the United States District Court for the District of Idaho, Southern Division. Appeal, if such there be, from the three-judge statutory court will then provide this Court with the opportunity to review the legislative apportionment of the State of Idaho.

Respectfully submitted

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M. ALLYN DINGEL, JR.,
Assistant Attorney General
State of Idaho
Counsel for Appellees, ARNOLD WILLIAMS, ALLAN G. SHEPARD, JOE R. WILLIAMS, MARJORIE RUTH MOON.

PROOF OF SERVICE

I, Allan G. Shepard, Attorney General of the State of Idaho, and one of the Attorneys for Appellees, ARNOLD WILLIAMS, ALLAN G. SHEPARD, JOE R. WILLIAMS, MARJORIE RUTH MOON *herein*, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the . . . day of March, 1965, I served copies of the foregoing Motion to Dismiss on the several parties thereto by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

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